UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BERNARD-THOMAS BUILDING SYSTEMS, LLC, Plaintiff,	:	Civil Action No. 3:04 CV 810 (CFD)
v.	:	
THE WEITZ COMPANY, LLC, d/b/a THE WEITZ COMPANY - NATIONAL, Defendant.	:	

RULING ON MOTION TO DISMISS

The plaintiff Bernard-Thomas Building Systems ("Bernard-Thomas"), a construction services company, brought this action in the Connecticut Superior Court alleging breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment under a subcontract agreement between the parties. The defendant removed the action to this Court pursuant to 28 U.S.C. § 1441. Subject matter jurisdiction is based on diversity of citizenship of the parties and an amount in controversy in excess of $75,000. See 28 U.S.C. § 1332. The defendant has now filed a motion to dismiss the plaintiff's complaint under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

I. Background[1]

On October 3, 2003, Bernard-Thomas entered a subcontract agreement ("Contract") with the defendant Weitz Company, LLC ("Weitz"), in which Bernard-Thomas agreed to render

[1] The allegations are taken from the plaintiff's complaint.

services and furnish materials as a subcontractor on the construction of a "commercial life care facility" called Stoneridge CCRC in Mystic, Connecticut. Weitz is the general contractor for Stoneridge CCRC, and Bernard-Thomas was to provide carpentry and related work to the project. Bernard-Thomas alleges that it performed its obligations under the Contract, as well as provided additional work at Weitz's request. The defendant, however, breached the Contract by unilaterally reducing Bernard-Thomas's applications for payment, interfering with Bernard-Thomas's ability to perform the subcontracted work, and improperly terminating Bernard-Thomas's employment and banning it from the building site.

Bernard-Thomas expressed its willingness to enter nonbinding mediation to resolve these disputes, as allowed under the terms of the Contract. Weitz refused this offer, at which point Bernard-Thomas filed the present claim. Weitz has now moved to dismiss Bernard-Thomas's claims, pointing out that the section of the Contract dealing with dispute resolution clearly states that, when the defendant declines to submit to mediation or arbitration, the plaintiff only may pursue litigation after "final completion" of the building project. The defendant asserts that the Mystic facility has not been completed and therefore the plaintiff's litigation is premature under the terms of the Contract.

II. Standard of Review

When considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d

Cir. 1991), cert. denied, 504 U.S. 911 (1992). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale-New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). Thus, a motion to dismiss under 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994) (citations and internal quotations omitted), cert. denied, 513 U.S. 816 (1994). In its review of a 12(b)(6) motion to dismiss, the Court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).[2]

III. Discussion

As Bernard-Thomas has alleged facts sufficient to survive a motion to dismiss, the only question before the Court is whether its lawsuit is premature under the terms of the Contract. The plaintiff concedes that the building project has not been completed, and that its suit theoretically is barred by the Contract's provision postponing litigation until "final completion of the Project." The plaintiff argues two reasons, however, as to why that provision should not be

[2] As the Contract between Bernard-Thomas and Weitz was referenced in the plaintiff's complaint, it properly may be considered in evaluating the motion to dismiss.

enforced: the phrase "final completion" is ambiguous, and any requirement to delay litigation is unconscionable.[3] The Court examines the plaintiff's objections to the Contract in turn.

Under Connecticut law, the intent of the parties as expressed in a written contract is determined by "a fair and reasonable construction" of the contractual language. Barnard v. Barnard, 570 A.2d 690, 214 Conn. 99, 110 (1990). If that language is clear and unambiguous, the contract should be given effect according to its terms. Id. Here, the language of the Contract requires that a dissatisfied subcontractor must delay suing over any dispute until "final completion of the Project."[4] Contract, Exh. D at § 10.3. The Contract defines "Project" as "Stoneridge CCRC." Given that definition, it is clear that "final completion" means final completion of Stoneridge CCRC, not merely completion of the subcontractor's work. As for the phrase "final completion" itself, the Court construes it to mean the completion of all construction

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[3] The plaintiff also argues that this provision of the Contract should be invalidated because it violates Article I, Section 10 of the Connecticut Constitution, which states that "All courts shall be open, and every person for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." That section is Connecticut's "due process and access to the courts provision . . . and has the same meaning and the same limitations as the federal due process provision." Chmielewski v. Aetna Casualty & Surety Co., 591 A.2d 101, 218 Conn. 646, 656 n.12 (1991).

Bernard-Thomas here has not been denied due process by either the federal or state governments; the company contracted with Weitz to delay filing suit, voluntarily postponing the time at which it could seek procedural remedies. Parties may contract and waive their rights to litigate without offending due process. See, e.g., Quigley-Dodd v. Gen. Accident Ins. Co. of Am., 772 A.2d 577, 256 Conn. 225, 247 n.11 (2001) (noting that contractual agreements to arbitrate may be enforced "without thereby raising constitutional concerns about due process"); L & R Realty v. Conn. Nat'l Bank, 715 A.2d 748, 246 Conn. 1, 10 (1998) (noting that contractual waiver of right to jury trial is permissible). The Court finds that the parties' contract does not violate the Connecticut Constitution, and will not invalidate it on this basis.

[4] The provision applies to all claims "arising out of or related to the Subcontract Documents or the breach thereof." Contract, Exh. D at § 10.1. Bernard-Thomas' allegations of unjust enrichment and breach of the covenant of good faith and fair dealing, which are related to its breach of contract claim, therefore also are barred if the provision is upheld.

on the facility. "A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity and words do not become ambiguous simply because lawyers or laymen contend for different meanings." Barnard, 214 Conn. at 110 (quoting Downs v. National Casualty Co., 152 A.2d 316, 146 Conn. 490, 494 (1959)). Therefore, the Contract provision is not unenforceable for ambiguity.

The plaintiff also argues that this provision should not be enforced due to unconscionability. "Unconscionability has both procedural and substantive components, requiring a demonstration of 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Williamson v. Public Storage, Inc., 2004 U.S. Dist. LEXIS 3799, *5 (D. Conn. Mar. 1, 2004) (quoting Emlee Equip. Leasing Corp. v. Waterbury Transmission, Inc., 626 A.2d 307, 31 Conn. App. 455, 463-64 (Conn. App. Ct. 1993)); see also Smith v. Mitsubishi Motors Credit of Am., 721 A.2d 1181, 247 Conn. 342, 349-50 (Conn. 1998).

There is no bright-line test for unconscionability. When evaluating a contract between commercial parties, however, Official Comment 1 to § 2-302 of the Uniform Commercial Code (enacted as Conn. Gen. Stat. § 42a-2-302) suggests that the test is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." Connecticut courts "do not generally find contracts unconscionable where parties are businesspersons." Emlee Equip., 31 Conn. App. at 464.

The plaintiff has not demonstrated any procedural unconscionability, as it could have declined to accept the subcontractor position and avoided the need to sign a contract. See Bolduc

v. Bridgestone/Firestone, Inc., 116 F. Supp. 2d 322, 324 (D. Conn. 2000). Neither can the Court find any substantive unconscionability in the terms of the Contract. It is true that the Contract's provisions are unequal: while the defendant is allowed to pursue litigation at any time, the plaintiff subcontractor is limited to filing suit after final completion of construction. Nonetheless, when the contracting parties are "knowledgeable and commercially sophisticated. . . in the absence of any other countervailing policy reason, they are bound by the express terms of the [contract] that they themselves drafted and executed." Herbert S. Newman & Partners, P.C. v. CFC Constr. Ltd. P'ship, 674 A.2d 1313, 236 Conn. 750, 760 (Conn. 1996). While the complete waiver of a right to sue might in some circumstances contravene public policy and be considered unconscionable, the Court finds nothing inherently unconscionable in a party's voluntary agreement to bring contractual claims upon completion of the contracted-for project.[5]

As the contract is not unconscionable, the plaintiff thereby is bound by its terms. Given the plaintiff's admission that the Stoneridge CCRC project has not been completed, the plaintiff's complaint is currently barred under section 10.3 to Exhibit D of the Contract.[6]

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[5] The Court does find substantively unconscionable the Contract's language that any claims brought by the plaintiff prior to final completion of the construction project shall be "immediately dismiss[ed] with prejudice." Contract, Exh. D. at § 10.3. Because "a dismissal with prejudice is a final adjudication on the merits that can give rise to res judicata," that action could preclude entirely the plaintiff's ability to seek judicial relief. Light Sources, Inc. v. Cosmedico Light, Inc., 2005 U.S. Dist. LEXIS 3698 (D. Conn. Mar. 4, 2005). The Court invalidates and declines to enforce this specific clause of the Contract. See Powertest Corp. v. Evans, 665 F. Supp. 134, 140 (D. Conn. 1986).

[6] The Court notes that, should the Stoneridge facility never reach "final completion" or should completion be delayed excessively, Bernard-Thomas then might have a claim that the Contract provision was substantively unconscionable. Absent such a showing, the language of the Contract is reasonable and enforceable.

IV. Conclusion

For the above reasons, Defendant's Motion to Dismiss Plaintiff's Complaint [Doc. #11] is GRANTED. The plaintiff's complaint is DISMISSED without prejudice. The Clerk is directed to close this case.

So ordered this __28th__ day of March 2005 at Hartford, Connecticut.

___/s/ CFD_____
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE